Supreme Court, U.S.
FILED
FEB 26 1997
CLERK

No. 96-1195

In The

Supreme Court of the United States

October Term, 1996

H & D ENTERTAINMENT, INC., ET AL.,

Petitioners,

v.

FLEET NATIONAL BANK, ET AL.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The First Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Should this Court reverse the First Circuit and adopt a *per se* disqualification rule which would preclude a receiver from selling receivership assets to a non-fiduciary whose affiliate (also a non-fiduciary) temporarily performed accounting services for the receivership prior to the sale, where there is no evidence of bad faith, fraud, collusion or the use of inside information?

2. Should this Court reverse the First Circuit and void a sale of receivership assets simply because the receiver engaged his firm as a broker for the sale where (i) the receiver obtained prior court approval to retain his firm, (ii) the Petitioners did not properly raise the issue below, (iii) there is no conflict between the circuit courts with respect to this issue, and (iv) the district court found the sale was commercially reasonable and in the best interests of the receivership estate?

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6 of the Supreme Court Rules, Respondents hereby make the following Corporate Disclosure Statement, identifying parent companies and nonwholly owned subsidiaries:

1. Fleet Financial Group, Inc. is the parent company of Respondent Fleet National Bank ("Fleet") and its shares are publicly traded. Fleet owns an interest in the following nonwholly owned subsidiaries: Allied International Bancorp, Inc., GTT Realty Limited Partnership and Onyx Properties Limited Partnership. Through wholly owned subsidiaries, Fleet also owns an interest in the following partnerships: SL Mortgage Company, Limited Partnership, Wamsutta Partners, and Broadmoor Property Associates.

2. PNC Bank Corp. is the ultimate parent of Respondent PNC Bank, Ohio, N.A. ("PNC"), and its shares are publicly traded. PNC does not own any shares of a nonwholly owned subsidiary.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

CORPORATE DISCLOSURE STATEMENT ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES iv

STATEMENT OF THE CASE 1

REASONS FOR DENYING PETITION FOR WRIT OF CERTIORARI 6

I. THE DECISION OF THE FIRST CIRCUIT COURT OF APPEALS IS NOT IN CONFLICT WITH THIS COURT'S RULING IN *MOSSER v. DARROW* 6

II. THE DECISION OF THE FIRST CIRCUIT COURT OF APPEALS IS NOT IN CONFLICT WITH DECISIONS IN OTHER CIRCUITS ... 9

III. *MANTANZA SHORES* DOES NOT WARRANT GRANTING CERTIORARI 13

A. Petitioners Waived And Abandoned Any Right to Challenge The Sale Based On MVP's Engagement As Broker 13

B. In Any Event, the Second Circuit's Decision in *Mantanza Shores* is Not in Conflict With the First Circuit's Decision Below.. 15

CONCLUSION 17

TABLE OF AUTHORITIES

Page(s)

CASES

Brown v. Trustees of Boston Univ., 891 F.2d 337 (1st Cir. 1989), *cert. denied*, 496 U.S. 937 (1990) 14

Citibank, N.A. v. Data Lease Fin. Corp., 645 F.2d 333 (5th Cir. 1981) 16

Donovan & Schuenke v. Sampsell, 226 F.2d 804 (9th Cir.), *cert. denied sub nom., Freedman v. Donovan & Schuenke*, 350 U.S. 895 (1955) 10, 11, 12

Duignan v. United States, 274 U.S. 195 (1927) 15

Greenhow v. Secretary of Health & Human Servs., 863 F.2d 633 (9th Cir. 1988) 14

In re Beck Indus., Inc., 605 F.2d 624 (2d Cir. 1979) 12

In re Exennium, Inc., 23 B.R. 782 (Bankr. 9th Cir. 1982), *rev'd*, 715 F.2d 1401 (9th Cir. 1983) 11

In re Exennium, Inc., 715 F.2d 1401 (9th Cir. 1983) 11

In re Frazin & Oppenheim, 181 F. 307 (2d Cir. 1910) 11

In re General Insecticide Co., 403 F.2d 629 (2d Cir. 1968) 12

In re Palm Coast, Mantanza Shores Ltd. Partnership, 101 F.3d 253 (2d Cir. 1996) 13, 15, 16

In re Rex Body Corp., 138 F.2d 912 (2d Cir. 1943) 12

In re Transcontinental Energy Corp., 683 F.2d 326 (9th Cir. 1982) 10, 11

Keller v. Petsock, 849 F.2d 839 (3rd Cir. 1988) 14

Lawn v. United States, 355 U.S. 339 (1958) 15

TABLE OF AUTHORITIES – Continued

Page(s)

Layne & Bowler Corp. v. Western Well Works, 261 U.S. 387 (1923) 9

Lytle v. Household Mfg., Inc., 494 U.S. 545 (1990) ..14, 15

Mosser v. Darrow, 341 U.S. 267 (1951)..... 6, 8, 9

Nagle v. Alspach, 8 F.3d 141 (3rd Cir. 1993), *cert. denied*, 510 U.S. 1215 (1994)..... 14

NLRB v. Pittsburgh S.S. Co., 340 U.S. 498 (1951) 9

Pagano v. Frank, 983 F.2d 343 (1st Cir. 1993)..... 13

Pollard v. United States, 352 U.S. 354 (1957)..... 15

Thomas v. Arn, 474 U.S. 140 (1985) 13

United States v. Ecker, 923 F.2d 7 (1st Cir. 1991)..... 13

United States v. Tracy, 989 F.2d 1279 (1st Cir.), *cert. denied*, 508 U.S. 929 (1993)..... 14

Wilson v. Schnettler, 365 U.S. 381 (1961)..... 9

Youakim v. Miller, 425 U.S. 231 (1975)..... 15

STATUTES

11 U.S.C. 327(a) 16

RULES

Sup. Ct. R. 10 .....1, 12

Fed. R. Civ. P. 72..... 13

RESPONDENTS' BRIEF IN OPPOSITION

The Respondents, Fleet National Bank (the "Bank"), PNC Bank, Ohio, N.A., and Charles E. Giddens, the court-appointed receiver (the "Receiver"), respectfully request that this Court deny the petition for a writ of certiorari seeking review of the First Circuit's opinion in the case below. The Petitioners argue that the First Circuit's decision approving the sale of receivership assets should be reversed for two reasons: (1) the assets were sold to a company whose affiliate had performed ministerial accounting services for the Receiver; and (2) the Receiver, with prior court approval, retained his own brokerage firm as the broker for the sale. Neither argument presents an "important federal question" justifying commitment of additional judicial resources to review this case on certiorari. Sup. Ct. R. 10. None of the issues that were raised before the First Circuit in this case were addressed in the cases relied upon by the Petitioners to suggest a conflict with decisions of this Court or decisions of other circuit courts. Moreover, none of the cases cited by the Petitioners support a decision contrary to the decision rendered by the First Circuit. There being no important federal question or conflict with either a decision of this Court or decisions of other circuit courts, the petition for writ of certiorari should be denied.

STATEMENT OF THE CASE

On December 2, 1994, the Bank commenced the underlying action against H & D Entertainment, Inc.; H & D Wireless Limited Partnership; H & D Media Limited Partnership; H & D Broadcasting Limited Partnership; and H & D

Radio Limited Partnership (collectively, the "H & D Group") seeking to collect over $12.9 million owed under certain notes and guarantees. Petitioners' Appendix ("App.") 22. On December 5, 1994, the district court entered an order appointing Charles E. Giddens as Receiver of the H & D Group and directing him to take possession of, manage, operate, and, subject to court approval, sell the assets of the H & D Group, which then consisted primarily of four am/fm combination radio stations (the "Radio Stations"). App. 22-23.

On February 3, 1995, the Receiver moved for approval to employ his firm, Media Venture Partners ("MVP"), as broker for the sale of the Radio Stations. App. 26. On March 9, 1995, after notice and a hearing, the magistrate judge approved MVP's employment – a fact omitted from the Petitioner's brief. App. 26. The Petitioners never requested that the district court reconsider the magistrate's order. App. 26, n.17.

MVP then solicited and received twenty-four first round bids for the Radio Stations on or before April 13, 1995. App. 26-29. Thereafter, the Receiver negotiated and, on July 31, 1995, entered into a Purchase and Sale Agreement with the high bidder, Spring Broadcasting, L.L.C. ("Spring"). App. 31-33. After five days of hearings and several modifications, the magistrate judge approved a sale procedure which involved a second round of competitive bidding, whereby MVP solicted counteroffers to Spring's Purchase and Sale Agreement.[1] App. 34. No

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[1] In their Statement of the Case, Petitioners allege that "after April 17, 1995, the Receiver never contacted the two bidders whose bids, in combination, totaled $14,300,000." *See* Petition, p. 6. That allegation is contrary to the district court's

second round counteroffers were submitted. App. 35. On October 27 and November 3, 1995, the district court held evidentiary hearings on the Receiver's motion to approve the sale to Spring. App. 35.

The Receiver then filed a motion requesting approval of three changes to the agreement between the Receiver and Spring. App. 37. The amended terms were put out to the public for a third round of competitive bidding. App. 37-39. Again, no counteroffers were submitted. App. 38.

On January 19, 1996, the district court conducted a third evidentiary hearing on the motion to approve the sale of the Radio Stations to Spring. App. 39. While the Petitioners made a number of attacks on the sale, they primarily maintained that Spring should be disqualified from purchasing the Radio Stations because a principal of Spring, P. Richard Zitelman ("Zitelman"), was also a principal of The Zitelman Group ("TZG"), an entity that had performed ministerial accounting functions for the Receiver at the inception of the receivership. The Petitioners argued that the district court should adopt a *per se* rule which would disqualify virtually anyone ever employed by the Receiver from purchasing the assets of the estate.

The district court rejected the Petitioners' arguments that a *per se* rule disqualified Spring. Instead, the district court followed a case-by-case approach which would disqualify a purchaser only where the sale is tarnished by

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findings of fact that after August 22, 1995, "MVP, again acting as broker for the Receiver, distributed notice of the second round bidding procedures to all the unsuccessful first round bidders, as well as to others who expressed an interest in the Radio Stations." App. 34.

bad faith, fraud or collusion. App. 49. Applying that analysis, the district court found no evidence of bad faith, fraud or collusion and found the sale to Spring to be commercially reasonable and in the best interests of the estate. App. 51-52.

The district court's decision was based in large part upon its finding that even during TZG's limited tenure as accountant for the Receiver, neither TZG nor Zitelman had a fiduciary relationship with the estate. App. 47. TZG had performed only very limited services for the estate on a temporary basis. Specifically, the district court found that "[a]lthough TZG offered a wide range of services, the Receiver only engaged TZG in a limited capacity, hiring the firm to perform certain ministerial accounting functions." App. 25. "TZG did not advise the receivership, provide financial audits, or direct investment of assets, with respect to the Radio Stations; nor did it participate in management decisions with respect to the operation of the Radio Stations or get involved in the MVP's sale efforts." *Id.*

TZG did not "have access to confidential information or even raw financial data" and was never given any information that was not available to other bidders. App. 29 and 47. Nor could Spring "responsibly have relied, in preparing its bid, on information to which Zitelman had access because of TZG's services." App. 28, n.23. Moreover, the relationship between the Receiver and TZG terminated on June 19, 1995, before negotiation of the

Purchase and Sale Agreement and before the second and third rounds of competitive bidding.[2] App. 31.

Finding that no *per se* rule disqualified Spring from purchasing the Radio Stations and rejecting the Petitioners' other arguments, on April 12, 1996, the district court entered an order approving the sale to Spring. The Petitioners appealed to the First Circuit raising, among other issues, the same argument concerning the propriety of Spring purchasing the assets. The Petitioners did not then argue – as they attempt to do here – that the sale should not have been approved because of the fact that the Receiver's firm was engaged as a broker for the sale.

The First Circuit Court of Appeals affirmed, noting that "the district court and the magistrate judge have done a very able job in handling this complex and contentious case." App. 16. Agreeing with the district court's case-by-case approach, the First Circuit Court stated that "the greater weight of authority is that any judgments as to disqualification of a non-fiduciary purchaser should be made on a case-by-case basis, taking account of all of the surrounding circumstances." App. 14. The First Circuit

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[2] The Petitioner's Statement of the Case on this issue again includes allegations directly contrary to the district court's findings of fact. Petitioners contend TZG resigned "more than half-way through negotiations of the Spring P&S." *See* Petition, p. 6. The district court expressly found that "prior to the negotiation of a purchase and sale agreement, TZG resigned as the Receiver's accountant." App. 31. The district court further found that "[a]ccording to credible testimony before this [c]ourt, Giddens requested that Zitelman resign before the two engaged in earnest negotiations." App. 31, n.29.

also noted that even in the few jurisdictions which arguably have adopted a *per se* rule, the courts do not uniformly follow the rule. *Id.*

The Petitioners now seek review on certiorari claiming that the First Circuit's decision decided an important federal question in a way that conflicts with a decision of this Court and decisions of two circuit courts. As discussed below, they are wrong. There is nothing remarkable about the First Circuit decision which warrants further review by this Court.

REASONS FOR DENYING PETITION FOR WRIT OF CERTIORARI

I. THE DECISION OF THE FIRST CIRCUIT COURT OF APPEALS IS NOT IN CONFLICT WITH THIS COURT'S RULING IN *MOSSER v. DARROW*.

The Petitioners first argue that *Mosser v. Darrow*, 341 U.S. 267 (1951), prohibits Spring from purchasing assets of the receivership estate. The facts in *Mosser*, however, bear no similarity to the facts in the case now before the Court and its rulings of law are inapplicable.

In *Mosser*, this Court held that the district court properly surcharged the reorganization trustee for profits which his employees had derived from personally trading in the debtors' securities. *Id.* at 270. The case did not involve the issue presented below concerning whether a sale should be approved. The debtors in *Mosser* were two common law trusts functioning "as holding companies and their principal assets were the securities of twenty-seven underlying companies, each of which owned

improved real estate and had its own debt and capital structure." *Id.* at 268. The reorganization trustee employed two individuals who previously had promoted the trusts. *Id.* at 269. Those individuals then managed the properties for the trustee and had "complete charge of all records of income, expenditures and properties of both debtors and all underlying companies." *Id.* Relying upon the "judgment and advice" of those individuals, the trustee then purchased and retired bonds of the debtors' subsidiaries at a discount rate. *Id.*

Without ever seeking approval from the district court, the trustee also authorized those two "key" employees, who were "indispensable" to the estate, to trade personally in the debtors' securities *while* employed by the trustee. *Id.* at 268-69 and 274. "On many occasions they acquired bonds for themselves and on the same day, or within a few days, transferred them to [the trustee] at a profit." *Id.* at 269. Those improprieties were discovered only after the Securities and Exchange Commission demanded an investigation, causing the trustee to resign and file accounts not previously filed during the *eight* years of trusteeship. *Id.* at 270. Not surprisingly, the Court held that the trustee should not have authorized the employees to self-deal and should have disclosed the conduct earlier. While recognizing the harshness of imposing a surcharge, this Court noted that the trustee could have limited, if not avoided, personal liability by disclosing the proposed relationship to the court in advance:

> The practice is well established by which trustees seek instructions from the court, given upon notice to creditors and interested parties,

> as to matters which involve difficult questions of judgment.

Id. at 274.

Completely contrary to the facts in *Mosser*, in the present case there was no undisclosed relationship which had not been subject to judicial scrutiny. Instead, the "sale has been repeatedly scrutinized by the market, by interested parties and by the court." App. 20. "It [was] the subject of three competitive bidding processes and a magistrate judge's careful monitoring, during which the relevant parties were given an opportunity to object to sale procedures and substance, and through which, where appropriate, the procedures adopted came to reflect the concerns of the parties." App. 20.

Moreover, the relationship between the receivership estate and Spring in this case is completely different from the relationship between the debtors' estate and the trustee's employees in *Mosser*. Unlike the employees in *Mosser*, Spring was never employed by the Receiver. Spring's affiliates TZG and Zitelman neither performed any key services for the Receiver nor were employed by the Receiver at the time of the sale. The district court specifically found that neither TZG nor Zitelman owed a fiduciary duty to the estate. App. 47. Unlike the employees in *Mosser* who provided advice to the trustee, "TZG did not advise the receivership, provide financial audits, or direct investment of assets, with respect to the Radio Stations; nor did it participate in management decisions with respect to the operation of the Radio Stations or get involved in MVP's sales efforts." App. 25. Further, unlike the employees in *Mosser* who purchased assets of

the debtor and resold those assets to the trustee *while* employed by the trustee, TZG was not performing any services for the estate at the time the Purchase and Sale Agreement was negotiated or during the second or third rounds of competitive bidding. App. 31. *Mosser* is simply not on point and the decision below is not so "repugnant to controlling rules and decisions of this Court" as to warrant the grant of certiorari. *Wilson v. Schnettler*, 365 U.S. 381, 383 (1961).

II. THE DECISION OF THE FIRST CIRCUIT COURT OF APPEALS IS NOT IN CONFLICT WITH DECISIONS IN OTHER CIRCUITS.

While the First Circuit may not have been persuaded by the reasoning in the narrow line of cases relied upon by the Petitioners, the decision below did not create a conflict between the circuit courts as the Petitioners suggest. First, neither the Ninth nor the Second Circuit Courts of Appeals ever has adopted a *per se* rule which would disqualify a non-fiduciary from purchasing assets of the estate in the absence of fraud, collusion or bad faith. Second, even if the cases cited by the Petitioners did support recognition of such a *per se* rule, in subsequent decisions each of the Ninth and Second Circuit Courts of Appeals has rejected that rule and adopted a case-by-case approach. It can hardly be said that the First Circuit's decision below creates a "real and embarrassing conflict of opinion and authority between the circuit courts of appeal" justifying review on certiorari. *NLRB v. Pittsburgh S.S. Co.*, 340 U.S. 498, 502 (1951) (quoting *Layne & Bowler Corp. v. Western Well Works*, 261 U.S. 387, 393 (1923)).

The Ninth Circuit cases cited by Petitioners do not recognize a *per se* rule which would disqualify Spring, a non-fiduciary, from purchasing the Radio Stations. In *Donovan & Schuenke v. Sampsell*, the Ninth Circuit reversed an order authorizing the sale of property of a bankrupt estate to a former president of the bankrupt who owed a fiduciary duty to the estate and who also was employed by the trustee to maintain and sell the property. *Donovan & Schuenke v. Sampsell*, 226 F.2d 804 (9th Cir.), *cert. denied sub nom., Freedman v. Donovan & Schuenke*, 350 U.S. 895 (1955). The court in *Donovan* stated that "[a] fiduciary cannot purchase property which he is empowered to sell." *Id.* at 811.

Unlike the purchaser in *Donovan*, Spring was not a fiduciary. Further, Spring's affiliate TZG was not a fiduciary of the estate, and was not employed by the receivership at the time of the sale. In further contrast to the purchaser in *Donovan*, neither Spring nor TZG was ever employed *at any time* to sell the Radio Stations or to advise the Receiver in any way with respect to the sale.

Whatever precedential force *Donovan* may have had, it has been narrowed substantially by *In re Transcontinental Energy Corp.*, 683 F.2d 326 (9th Cir. 1982), a case much more analogous to the one now before the Court. Like the Petitioners here, the appellants in *Transcontinental* relied on language in *Donovan* that would "make any person a trustee or fiduciary who has had a connection with any other person or entity or who has been employed or concerned with the affairs of others and thereby acquired a knowledge of the property and concerns of the others." *Transcontinental*, 683 F.2d at 328 (quoting *Donovan*, 226 F.2d at 811). The Ninth Circuit found their argument to

"rely too heavily on the 'broad dicta' " in *Donovan* and accordingly confirmed a judicial sale where an individual related to the purchaser previously had operated a portion of the assets, but where, as here, the purchaser did not owe the bankrupt a fiduciary duty and there was no evidence of bad faith, fraud, collusion, or use of inside information. *Transcontinental* at 328-29.

Similarly misplaced is the Petitioners' reliance on *In re Exennium, Inc.*, 23 B.R. 782 (Bankr. 9th Cir. 1982), *rev'd*, 715 F.2d 1401 (9th Cir. 1983). In that case, the purchaser had been the *attorney* for the debtor and therefore owed the estate a fiduciary duty. 23 B.R. at 786. The Ninth Circuit reversed *Exennium* on other grounds and criticized the underlying court's reading of *Donovan* "as holding that sales to fiduciairies can be overturned at any time because they are void." *In re Exennium, Inc.*, 715 F.2d 1401 (9th Cir. 1983).

The Second Circuit case relied upon by the Petitioners, *In re Frazin & Oppenheim*, 181 F. 307 (2d Cir. 1910), also does not support a *per se* rule which would have disqualified Spring from purchasing the Radio Stations. There the Second Circuit considered "whether an official appraiser of a bankrupt estate may, prior to the filing of the appraisal, purchase property of the estate." *Id.* at 308-309. Significantly, the court observed that the appraiser was "an officer of the court," and that he "necessarily obtain[ed] confidential information concerning the cost of the property to be appraised and concerning many other matters affecting its value and the price to be obtained for it." *See id.* at 311. Simply stated, the court was faced with a purchaser who possessed confidential information and could exploit it to his advantage and to

the detriment of the estate. *See id.* at 310. Expressly left open was the question of whether the appraiser could purchase from the estate after filing his appraisal. *Id.* at 311.

Frazin is inapposite here. First, unlike the appraiser, "neither TZG nor Zitelman individually had a fiduciary relationship with the estate." App. 47. Second, unlike the appraiser, "the tasks performed by TZG were ministerial in nature." App. 47. Moreover, "TZG [did not] have access to confidential information or even raw financial data." App. 47. As a result, neither TZG nor Spring possessed confidential information that they could exploit for their benefit and to the detriment of the receivership estate and its creditors.

Moreover, the Second Circuit implicitly has overruled *Frazin* and adopted the case-by-case approach adopted by the First Circuit below. *See In re Rex Body Corp.*, 138 F.2d 912, 913 (2d Cir. 1943) (approving sale of estate to fiduciary of the bankrupt). *See also In re Beck Indus., Inc.*, 605 F.2d 624, 635-37 (2d Cir. 1979) (refusing to follow *Donovan*); *In re General Insecticide Co.*, 403 F.2d 629, 631 (2d Cir. 1968) (finding *Donovan* inapposite "because the purchaser . . . was not a fiduciary with respect to the property sold").

The First Circuit's decision below is not "in conflict with the decision of another United States court of appeals on the same matter." Sup. Ct. R. 10. The First Circuit decided the issue of whether a *non-fiduciary* may purchase assets of the estate in the absence of bad faith, fraud or collusion. Because the Ninth and Second Circuit decisions cited by Petitioners do not address the issues

raised below – and are not even uniformly followed within those circuits – there is no conflict between the circuit courts.

III. *MANTANZA SHORES* DOES NOT WARRANT GRANTING CERTIORARI

A. Petitioners Waived And Abandoned Any Right to Challenge The Sale Based On MVP's Engagement As Broker.

The Petitioners now attempt to argue that the sale should be reversed because the Receiver's firm was engaged as the broker for the sale. That argument, however, was not made to, or addressed by, the First Circuit. There is, therefore, no conflict between the circuit courts warranting further review by this Court.

On March 9, 1995, upon notice and after hearing, the magistrate judge approved the retention of MVP as the Receiver's broker for the sale of the Radio Stations. App. 26. The Petitioners failed to move for reconsideration or to file an objection to the magistrate's order in the district court. *Id.* Such failure operated as a waiver of the Petitioners' right to seek further appellate review of the magistrate's decision. *Thomas v. Arn*, 474 U.S. 140, 155 (1985) (determination that failure to object to magistrate's order within mandated time frame waives right to later appeal of order did not violate petitioner's due process rights); *Pagano v. Frank*, 983 F.2d 343, 346 (1st Cir. 1993) (party who fails to file objections to magistrate's non-dispositive order within ten days "may not thereafter assign as error a defect in the magistrate's order") (*citing* Fed. R. Civ. P. 72); *U.S. v. Ecker*, 923 F.2d 7 (1st Cir. 1991)

(magistrate's order is generally not a final order which is subject to direct appellate review; the argument must be made first to the district court); *see also Keller v. Petsock*, 849 F.2d 839, 842 (3rd Cir. 1988) (court of appeals is without jurisdiction to hear appeal of magistrate's order that is not first raised in district court); *but see Greenhow v. Secretary of Health & Human Servs.*, 863 F.2d 633, 636 (9th Cir. 1988) (failure to file objections to magistrate's order waives only factual issues on appeal).

Furthermore, in their brief to the First Circuit, the Petitioners did not challenge the propriety of the Receiver's retention of MVP as broker.[3] The First Circuit quite appropriately did not address this issue because the Petitioners had abandoned and waived this argument. *See Nagle v. Alspach*, 8 F.3d 141, 143 (3rd Cir. 1993), *cert. denied*, 510 U.S. 1215 (1994) (when issue not set forth in statement of issues or pursued in appellate brief, the issue is deemed abandoned and waived); *United States v. Tracy*, 989 F.2d 1279, 1286 (1st Cir.), *cert. denied*, 508 U.S. 929 (1993) (issues advanced with virtually no argument and no citation to authorities are deemed waived); *Brown v. Trustees of Boston Univ.*, 891 F.2d 337, 352 (1st Cir. 1989), *cert. denied*, 496 U.S. 937 (1990) (university abandoned argument when it failed to address argument in appellate brief).

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[3] While the Petitioner's preliminary statement of issues filed with their designation of the appendix included reference to MVP's engagement as broker, the issue was not included in either of the Statement of the Issues or Argument sections of their brief.

It is axiomatic that absent "exceptional circumstances" the Supreme Court will not consider issues that were neither raised nor considered by the court of appeals. *Duignan v. United States*, 274 U.S. 195, 200 (1927); *Lytle v. Household Mfg., Inc.*, 494 U.S. 545, 546 (1990); *Lawn v. United States*, 355 U.S. 339, 362-63, n.16 (1958). The "exceptional circumstances" required are not present here. *See, e.g., Youakim v. Miller*, 425 U.S. 231, 234 (1975) (important conflict between state and federal statutes); *Pollard v. United States*, 352 U.S. 354, 359 (1957) (criminal pro se defendant allowed to raise issues of constitutional significance which were not considered below).

This Court has recognized that the rule against considering issues not raised in the courts below is required to preserve judicial economies. *See Thomas v. Arn*, 474 U.S. at 147. Absent such a rule, this Court would be forced to review issues not reviewed by the circuit court, and the circuit court would be forced to review every issue raised in the district court even though not presented for review by the parties. The petition for writ of certiorari should be denied simply because the Petitioners did not properly raise this argument below and have presented no "exceptional circumstances" which would warrant review of this issue in this Court.

B. In Any Event, the Second Circuit's Decision in *Mantanza Shores* is Not in Conflict With the First Circuit's Decision Below.

Even if the First Circuit had addressed the propriety of retaining MVP and its effect on the sale, the First Circuit's decision approving the sale would not be in

conflict with the law of the Second Circuit. The Petitioners contend that the First Circuit's decision below is in conflict with the decision in *In re Palm Coast, Mantanza Shores Ltd. Partnership,* in which the Second Circuit reversed an order permitting a Chapter 11 bankruptcy trustee to retain his own brokerage firm. *Mantanza Shores,* 101 F.3d 253, 258 (2d Cir. 1996). Like the other cases cited by the Petitioners, *Mantanza Shores* is not on point. In *Mantanza Shores,* the Second Circuit addressed "the question of whether the Bankruptcy Code permits a bankruptcy trustee to employ his real estate firm as real estate consultant to the bankruptcy estate." *Id.* at 256. The Code specifically provides that the trustee may employ only professional persons "that do not hold or represent an interest adverse to the estate, and that are disinterested persons." 11 U.S.C. 327(a). This case, however, concerns a receivership not governed by the Bankruptcy Code. Unlike a bankruptcy case, a federal receivership is governed by equitable principles which allow a court to approve a sale under terms and conditions in the best interest of the receivership estate. *See, e.g., Citibank, N.A. v. Data Lease Fin. Corp.,* 645 F.2d 333, 339 (5th Cir. 1981).

The recent decision in *Mantanza Shores* does not create a conflict between the circuit courts because the Second Circuit did not address the issues addressed by the First Circuit. There is, therefore, no compelling reason to warrant further review of this case on certiorari.

CONCLUSION

For all of the foregoing reasons, the Respondents respectfully request that this Court DENY the petition for a writ of certiorari.

Respectfully submitted,

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